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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-195

JOSEPH ZICARELLI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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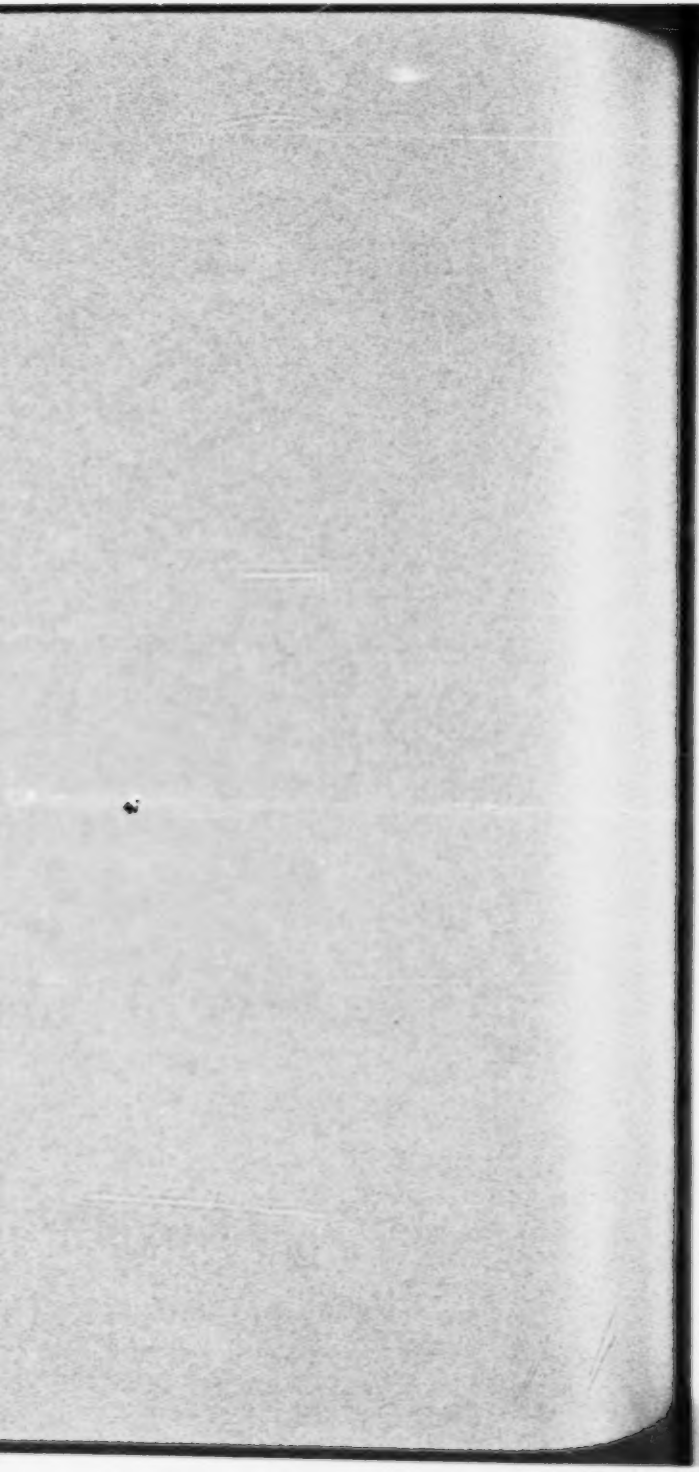

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UNITED STATES CONSTITUTION CITED

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Docket No.

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STATE OF NEW JERSEY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Your respondent respectfully urges denial of the writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the within matter on January 29, 1973, as sought by petitioner.

COUNTER STATEMENT OF THE CASE

For purposes of the Court's consideration of the petition, respondent accepts the "Statement" (pp. 3-8) set forth in the petition. In addition thereto, respondent would urge the Court to consider the following regarding the questions raised in the petition:

Venue.

Venue was originally designated in Burlington County, New Jersey, on this indictment which was one of the series of seven associated indictments all involving Joseph Zicarelli and Frank Mallamaci as defendants. Venue on the first was laid originally in Hudson County. Venue on the next five to come down (SGJ2-70-8A; SGJ2-70-8B; SGJ2-70-8C; SGJ2-70-8D; and SGJ2-70-8E) was originally laid in Mercer County.

Upon application of the State, venue on SGJ269-2 was changed to Mercer County. That application was supported by

the verified petition of the codirector of the Organized Crime and Special Prosecutions Section of the Division of Criminal Justice. It recited that subsequent to the return of SGJ2-69-2, four other indictments naming Zicarelli and Mallamaci had been returned and allocated to Mercer County; the prosecution of each of these indictments required the testimony of one individual (Policastro), whose personal safety was in extreme danger; this witness was in protective custody and his protection required that he be moved as little as possible and then only to locations where security arrangements could be made in the Mercer County area. The court thereupon reallocated SGC2-69-2 to Mercer County, New Jersey.

The next five indictments, SGJ2-70-8A through 8E, were originally allocated to Mercer. However, the State determined that security arrangements would still be difficult in populous Trenton and would be simpler in less populous though nearby Burlington County. For this reason, the State applied for a reallocation of venue for all of these matters. This was granted.

Judge Kingfield, the assignment judge, designated to preside over the State Grand Jury, in later explaining his actions indicated that the initial designation of Mercer was only intended to be temporary — the bulk of State Grand Jury indictments bear an initial allocation to Mercer where he sits. The reallocation to Burlington was a logical choice because while no courtroom was available in Mercer County, a courtroom and a judge were available in Burlington.

Petitioner sought to challenge the allocation of venue and was granted a hearing before Judge Van Sciver who was to try these cases. The court denied the motion to change the venue. Petitioner then sought leave to appeal first in the Appellate Division, which was denied, and then in the Supreme Court of New Jersey.

The New Jersey Supreme Court remanded the matter for a hearing because they felt Judge Van Sciver erred in indicating that he felt bound by Judge Kindfield's prior order. On the remand to Judge Kingfield on March 9, 1971, the judge agreed with the conclusion of defense counsel, Mr. Newman, that the court was to consider the matter strictly "de novo," unbound by prior decisions.

Petitioner and his codefendants were given a full ,op-

portunity to submit briefs and argue on the matter as if it were coming before the court for the first time on the motion of the State, with the State bearing the burden of persuasion.

In passing on what in effect was a renewed application on the contested motion, the court was principally moved by consideration for the witness Policastro's security. It was also moved by the fact that because various of the defendants involved were public figures and men of considerable influence in Hudson County, a fair trial for all sides would be difficult to achieve in that locale. Finally the court was moved by the failure of defendants to demonstrate any prejudice that would inure to them as a result of being tried in Burlington. Now, after this trial, petitioner still cannot point to a single indication that they were so prejudiced.

Summary Of Jury Selection.

Petitioner takes issue with the sufficiency of the court's voir dire of prospective jurors contending that it failed to pose a direct inquiry as to prospective jurors' exposure to pretrial publicity regarding the case. He argues that such inquiry was necessary in order that he might exercise his peremptory challenges effectively.

After the fifteenth prospective juror called (one had already been excused) was placed in the jury box, the court asked the panel—

> "if any of you jurors who presently occupy the jury box had any occasion to read, hear, see or discuss with anyone the case at hand and the personalities allegedly identified therewith, or expressed an opinion with respect to the merits of the case at hand?" (1T33-9 to 14).

Several jurors responded to the inquiry by raising their hands. The court proceeded to explore with each one the nature of their exposure to pretrial publicity. (1T34-9 to 1T37-11). The record discloses that following this, the voir dire of every other prospective juror which progressed past preliminary questions contained an inquiry, at least by reference, to the matter of exposure to pretrial publicity. Typically, the court's inquiry was a variation on the following:

"THE COURT: You have heard the questions that I have posed to them thus far?
JUROR: Yes.

THE COURT: If I were to address all of those matters to you individually, is there anything in any of your answers to those questions or the subject matter of those questions, that would bring answers that we should discuss with you, having in mind that we have concern about your ability to be a completely fair and impartial juror?"
(1T39-16 to 1T40-1).

Continuing:

"THE COURT: In the question of reading, hearing seeing or discussing with persons anything related to the alleged facts of this case, or the merits or expression or opinion with respect to this case, is there anything as it relates to you that would indicate an experience of yours of that nature?"
(1T40-18 to 24).

During the first day of trial, the court made this form of inquiry on approximately 45 occasions. Several prospective jurors responded by detailing the nature of their exposure to pretrial publicity, with particular reference to the media through which they had been exposed; *e.g.* 1T83-24 to 84-1; 1T93-1 to 3; 1T94-17 to 18; continuing into the afternoon session, 1T108-5 to 8; 1T109-22 to 25; 1T128-4 to 6; 1T129-16 to 18; 1T134-1 to 11; 1T136-21 to 24; 1T143-15 to 16; 1T148-6 to 7. While responding to the inquiry affirmatively as to exposure to pretrial publicity, certain prospective jurors coupled this response with a declaration of impartiality, *e.g.*, ". . . I read three different newspaper articles on this trial, but I feel I have an open mind at the present time." (1T134-1 to 3). "I read about it . . ., but I feel I can serve and be impartial." (1T136-21 to 24).

On the second day of jury selection the court continued to make general inquiries of every prospective juror. Such inquiries evoked responses as to the individual's exposure to pretrial publicity, as well as attitudes towards gambling and

sequestration. (2T25-3 to 5; 2T41-14 to 16). At one point the court made an extended inquiry of one juror as to "exposure to various media" or "any circumstances which you have come in contact . . ." (2T25-6 to 24.).

After the reserve jury panel was brought in, (2T51-18) the court generally instructed them that, ". . . it is essential that each and all of you hear and digest some material which I give you for consideration." (2T52-12 to 14). The court continued, ". . . the intent of our examination is to determine whether or not there exists any reason why you could not be a fair and impartial juror and discharge your function as a juror in accordance with the oath . . . ." (2T53-12 to 16).

Charles W. Cline, who eventually sat in judgment, was the first juror placed in the box from the reserve panel. (2T56-2). The court posed the following question to Mr. Cline:

> "Having in mind that we readily admit that none of us live or operate in a vacuum, and that we all are exposed to circumstances and media about us, and having in mind also that there may well have appeared in various of the press media certain articles that relate in some fashion to the trial of this case or the personalities involved, is there any experience that you have had with regard to reading, hearing or discussing the merits of this case or expressing our (sic) opinion with respect to the merits of this case?" (2T59-11 to 21).

Cline responded in the negative.

The next prospective juror on the reserve panel was asked by the court:

> "Did you hear the material that I reviewed following your entry into the court room with the jury panel, . . . the material I have reviewed with Mr. Cline, for consideration?" (2T62-10 to 15).

Two more prospective jurors were asked the general question by the court in reference to materials it had reviewed. The third

prospective juror called after Mr. Cline was Edward Bart who also sat on the final jury. Bart was also asked the general question as to materials and subject matter the court had reviewed with prospective jurors. In response, Bart brought to the attention of the court the fact that "he favored gambling." (2T67-14 to 24).

At this point, Mr. Querques, on behalf of defendant Zicarelli, joined by other defense counsel, indicated a tentative conclusion that the jury as constituted was satisfactory. However, he stated to the court that his notes did not indicated any of them had been asked a question as to whether or not, ". . . they have read anything (about the case) . . ." He asked that a further question be posed by the court in that connection. (2T69-13 to 70-73). To this the prosecutor responded, "It seems to me that you have made it clear with the new supplementary panel that has been brought in as to matters of publication. And, this panel that is now in the box — that is those twelve of them — were left over from the original panel that were here during the time that you spoke with the supplementary panel." (2T70-15 to 21). The court declined to grant defense counsel's request. (2T74-12 to 13).

Following this, additional prospective jurors were called. Robert Tims, who sat on the case, was asked the general question to which he responded negatively. (2T80-13 to 81-2). Likewise, jurors Smith (2T102-12 to 20), and Coe (2T127-6 to 12), who eventually sat on the case responded negatively. However, in the course of the *voir dire*, the viability of a court's prior discussions and examination as to exposure to pretrial publicity was indicated by positive responses of prospective jurors, *e.g.*, 2T99-19 to 21; 2T107-2 to 3.

After the State indicated the panel was acceptable to it, Mr. Querques renewed his request to the court for a further question as to whether or not members of the panel had read newspaper articles or heard broadcasts, etc., relating to the case. (2T128-13 to 129-9). The court denied the request. (2T134-4 to 5).

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONSTITUTIONAL RIGHT TO BE TRIED IN THE "COUNTY" IN CONTRAST TO THE "(FEDERAL JUDICIAL) DISTRICT," WHEREIN THE CRIME WAS COMMITTED.

The New Jersey Supreme Court in *State v. DiPaolo*, 34 *N.J.* 279 (1961), *ert.* den. 368 *U.S.* 880 (1961), declared that, "In light of both the history and the reason for the guarantee, we cannot fairly assume the constitution intended to imbed a rule of venue." *DiPaolo, supra*, 34 *N.J.* at 286. The court also stated there, " . . . we are satisfied that the Constitution does not embody the common law rule of venue." *Id.* at 287. Petitioner however, argues that recent cases indicate that the Sixth Amendment, which must now be found to bind the states, commands a different conclusion. The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and *district* wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (emphasis supplied).

From the broad proposition that this language binds the states as well, with which respondent does not take issue, petitioner asks this Court to find that in the context of a State prosecution, the term "district" must be equated to "county" if that is how local subdivisions are reckoned in a state; and an accused must therefore have the right to a trial in the county wherein the crime was committed. The argument is sophistical.

Assuming that there is a Sixth Amendment "venue" requirement, it should be noted that in every other case where a procedural guarantee of the Bill of Rights has been translated to a State proceeding, the intention and effect have been only to insure conceptual and practical parity to the State court defendant. This process has generally presented no particular practical

or intellectual problem in terms of what was contemplated by the Court for the federal practice could be carbon copied.

The venue concept is somewhat unique in that its efficacy is premised on certain assumptions regarding geography as it relates to trial fairness, which is the basis for the "district" limitation. States are only divided into "districts" in the federal system and the place of defendant's trial is thus confined to these large, well defined geographical areas forming a part of the state, or the whole state where that state, like New Jersey, covers a small geographical area. In the absence of any unit in the State judicial system being denominated a "district," petitioner reasons that, perhaps because of some constitutionally implicit notion of symmetry or some idea that the Constitution requires the maintenance of state judicial systems as microcosms of the federal system, that "district" must be equated to "county."

Apart from the obvious infirmity of this reasoning viewed as an exercise in logic, political science, or semantics, it should be noted that its acceptance would lead to a particularly anomalous result: only as to the venue which must rank among the most denigrated and oft-forsaken procedural requirements of the criminal process, the accused would enjoy a right of much greater dimension and specificity on a state level than in the federal system if the particular state happened to have established political subdivisions smaller than federal districts. Such a greater right would serve no practical end. On the other hand, if the state chose not to provide a separate court for every county (in Texas for instance there are over 500 counties) by petitioner's lights it would seem than an accused could claim immunity from any trial at all if there were no court in the county where the crime occurred.

It is respectfully suggested that the Constitution does not command such absurdity. If it dictates anything as to venue, it is only that a state defendant have the right to be tried within the confines of no larger an area than he would if his offense were federal. In other words, the inquiry must be, if the matter were to be removed to a federal court, where could defendant be tried consistent with the Sixth Amendment? The latter question was the one posed by the only court found to have considered the issue raised as to the meaning of "district" language. *State of Maryland v. Brown*, 295 *F. Supp.* 63, 82 (D.Md. 1969). In New Jersey,

removal would result in a defendant enjoying the right to be tried in the "federal district of New Jersey" which encompasses the whole state. Thus, on a federal level in New Jersey, the meaning of the "district" language is academic. In order to grant the defendant the same practical right in a State court as in a federal court, a determination of which "district" he should be tried in, or what in fact "district" means, would likewise be irrelevant. Any other conclusion, *i.e.*, that urged by petitioner, would be untenable. Or, as Judge Kingfield concluded, for purposes of the State Grand Jury, the State is one "district."

It is respectfully urged that the scholarly discussion by the court in the *Brown* case should lay to rest any historical question in this area. The gloss defendants have given their contentions can not serve to obscure what common sense rejects. See especially *Brown, supra,* 295 *F. Supp.* at 78-82.

POINT II

DUE PROCESS OF LAW WAS NOT VIOLATED BY THE DESIGNATION OF VENUE HERE.

There is recent authority on the question which holds that nothing in the Constitution limits a state court, at the behest of the prosecution, in changing the venue of trial for "good cause shown" over defendants' objection. *Brown, supra* at 82.

But in any event, it is clear that in remanding the venue question to Judge Kingfield for a hearing *de novo,* it was the belief of the Supreme Court that any basis for complaint resulting from the *ex parte* nature of the initial allocation of venue in the companion cases to this one, would be thereby rectified. Assuming the basis for the initial allocation of the instant case can be traced from the *ex parte* application, it is clear that petitioner upon remand was afforded the sort of full and fair hearing that would be mandated if due process so required, Judge Kingfield's decision clearly reflects that he reevaluated all of defendants' arguments, not as if they bore the risk of non-persuasion, but rather as if the whole matter were coming to him for the first time. His reasons for selecting Burlington were laid out fully on the record and were clearly substantial.

Moreover, in the absence of any showing that the court's designation of venue would or in fact did prejudice petitioner's trial rights, it is respectfully submitted that any alleged shortcomings in the manner of that designation need not concern this Court.

POINT III

ZICCARELLI'S FOURTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE INTRODUCTION OF HIS CONVERSATION WITH POLICASTRO.

The extension of *Massiah v. United States*, 377 *U.S.* 201 (1964) sought vy Zicarelli as to incriminating statements elicited by an undercover agent while defendant was already under indictment for an unrelated crime, was considered and rejected by this Court in *Hoffa v. United States*, 385 *U.S.* 293, 304-310 (1966). In *Hoffa*, the situation was excacerbated because the defendant was not only under indictment but on trial on the earlier charge.

POINT IV

THE EXAMINATION OF PROSPECTIVE JURORS INCORPORATED THE INQUIRY PETITIONER CLAIMS WAS NECESSARY FOR AN EFFECTIVE EXERCISE OF HIS PEREMPTORY CHALLENGES.

Petitioner seeks to raise interesting questions regarding the sufficiency of a *voir dire* examination where the possibility of prejudicial pretrial publicity exists. However, treatment of those questions must await another case. Analysis of the record of the pretrial *voir dire* reveals that an inquiry of the character petitioner urges was necessary to make effective use of the peremptory challenge where pretrial publicity is a concern, was in fact made of all of the individuals who eventually sat on the jury.

As set forth in the "Counter-Statement of the Case" when for the first time fourteen persons were seated in the box, the court put to them a question calling for each one to disclose any form of pretrial publicity dicussions or experiences to which they had been exposed relating to the case. To this inquiry, several persons responded and were questioned as to the nature of their exposure. (1T33-9 to 37-11). The court's examination of every other prospective juror the first day included a reference to this inquiry and demanded a response to it. That such was understood as being sought was indicated by the number of prospective jurors who alerted the court to their exposure, usually gratuitously coupled with either a disclaimer of being affected, or a confession of having a predetermined idea as to guilt or innocence. (E.g., 1T134-1 to 3; 136-21 to 24).

On the second day, the court continued to make the same form of inquiry to members of the initial panel. At one point the court asked one individual about any exposure to communications media relating to the trial. (2T25-6). That prospective jurors on the second day were still aware that the court sought information as to exposure and attitudes regarding gambling is an indication that the general question had continued efficacy in this connection. (2T25-3 to 5; 41-14 to 16). Thus, as to the jurors chosen from the initial panel, it is clear that all were subjected to examination as to whether they had been exposed to pretrial publicity.

Petitioner's contentions regarding the sufficiency of the *voir dire* seems to emanate from the reflection of his trial counsel, Mr. Querques, who stated that his notes did not indicate that the jurors seated had been asked a question as to whether "they have read anything (about the case)." (2T69-13 to 70-12). As petitioner now concedes, all of those from the first panel had been asked this.

Examination of the record reveals that petitioner's counsel's supposition was incorrect as to members of the reserve panel; on the other hand, the prosecution was correct in insisting that the members of the new panel had in fact been queried as to "matters of publication." (2T70-15 to 21).

First it should be noted that juror Cline who sat on the case was the first person drawn from the new reserve panel. (2T56-2). As set forth in the "Counter-Statement of the Case," the court in very direct fashion asked him in the presence of the rest of the panel not only whether he had read anything in the press, or been exposed to anything else in other media relating to the trial, but also whether he had any "experience" including exposure to any sort of discussion or airing of opinion relating to the case. (2T59-11 to 21).

The next prospective juror was pointedly asked whether he heard the materials reviewed with Cline by the court. (2T60-10 to 14). Edward Bart, who also sat on the final panel, was the second person to follow the man who was asked this question and his response to general questions indicated an awareness of what was required to be disclosed. He indicated he favored gambling. (2T67-14 to 24).

The other three jurors chosen from the reserve panel: Tims (2T80-13 to 81-2); Smith (2T103-12 to 20); and Coe (2T127-6 to 12), were asked the same question and responded negatively. However, their examination was in close proximity to that of persons responding by admitting exposure to publicity. (2T99-19 to 21; 107-2 to 3).

Thus, it appears that counsel was mistaken in maintaining that members of the jury were not forced to respond to a direct inquiry as to exposure to publicity. Moreover, it is submitted that even if it had not been so, the question which petitioner acknowledges was asked would have been sufficient under the circumstances to elicit the information sought. The responses of persons to publicity inquiries indicated an understanding that their duty was to disclose exposure and let the court determine its

effect on impartiality, irrespective of whether the prospective juror felt prejudiced thereby.

In light of record of the *voir dire*, it is submitted that it did not suffer from the infirmity alleged by petitioner and this Court need not concern itself with petitioner's legal contentions in this connection.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the Petition for Certiorari to the New Jersey Superior Court, Appellate Division, not issue.

Respectfully submitted,
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